BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBORAH K. ZUERCHER	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 186,892 & 233,958
WHEAT STATE MANOR, INC. and	)	
NEWTON MEDICAL CENTER	)	
Respondents	)	
AND	)	
	)	
KANSAS ASSOCIATION OF HOMES FOR THE	)	
AGING INSURANCE GROUP, INC. and	)	
KANSAS HOSPITAL ASSOCIATION	)	
Insurance Carriers	)	

ORDER

One of the respondents, Wheat State Manor, Inc. (Wheat State), and its insurance carrier, Kansas Association of Homes for the Aging Insurance Group, Inc., appeal from an Order dated October 15, 1998, that grants claimant preliminary hearing benefits of temporary total disability and medical treatment and authorizes one of the physicians that has treated claimant to continue as claimant's authorized treating physician. The Order, entered by Administrative Law Judge John D. Clark, also ordered Wheat State and its insurance carrier to pay all medical bills.

ISSUES

Wheat State and its insurance carrier describe the issues for review as follows:

1.) Did the Administrative Law Judge err by consolidating for hearing a post-Award Application for Review and Modification with an Application for Preliminary Hearing in a wholly unrelated matter?

2.) Did the Administrative Law Judge err by considering medical evidence in regard to a post-Award Application for Review and Modification that was:

a.) not offered by claimant;

b.) not offered by respondent and insurance carrier;

c.) not prepared or maintained by a doctor in the course of his practice; or

d.) not substantiated by a doctor's deposition testimony.

3.) Did the Administrative Law Judge err by determining that claimant's current medical condition and need for benefits was due to her pre-existing condition and not the intervening injury that occurred while claimant was employed with the Newton Medical Center?

4.) Did the Administrative Law Judge err by ordering respondent and insurance carrier to pay benefits for periods prior to having knowledge of re-injury or the filing of the Application for Review and Modification?

Respondent, Newton Medical Center (Newton), and its insurance carrier, Kansas Hospital Association, argue that if Judge Clark's Order was entered following a preliminary hearing then this appeal must fail on jurisdictional grounds because the appellant Wheat State does not allege the ALJ exceeded his jurisdiction. *See,* K.S.A. 1997 Supp. 44-551(b)(2)(A).

The Appeals Board must first determine whether the ALJ has the authority to conduct a preliminary hearing in Docket No. 186,892 after entering the award and, if so, what the Appeals Board's jurisdiction is to hear an appeal from a post-award preliminary hearing order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments presented, the Appeals Board finds and concludes as follows:

An ALJ may conduct a preliminary hearing as a part of a post-award review and modification proceeding.

The Appeals Board has on many occasions approved the use of the preliminary hearing procedures as a part of a post-award application for review and modification. The Board has done so, however, based largely upon the fact that the parties treated the proceedings as a preliminary hearing.

Although the preliminary hearing statute K.S.A. 1997 Supp. 44-534a does not specifically provide that this is also a procedure to be used post-award, there is, however, other statutory authority for a post-award preliminary hearing. For example, in Andrews v. Blackburn, Inc., Docket No. 158,135 (July 1996), the Appeals Board, for several reasons, concluded that the preliminary hearing procedure may be used in a post-award proceeding. First, the language from K.S.A. 1997 Supp. 44-534a was not, in our opinion, intended to limit the use of preliminary hearings. Instead, it was intended to indicate that the final award would supersede any preliminary hearing order. An application for review and modification reopens the hearing. Second, policy justifications for preliminary hearings

before an award continue to exist after an award. The need for a prompt resolution of issues relating to medical care and temporary total disability benefits may be as urgent after an award as before. Finally, the Act contains at least one example where the legislature expressed the authorized use of a preliminary hearing procedure after an award. K.S.A. 1997 Supp. 44-556 authorizes the use of preliminary hearing procedures under K.S.A. 1997 Supp. 44-534a to enforce rights to medical treatment while a case is pending on appeal before the Court of Appeals. Also, K.S.A. 1997 Supp. 44-551(b)(2)(C) authorizes the use of a preliminary hearing to enforce payment of medical benefits while a case is pending before the Appeals Board.

By affirming the use of a preliminary hearing procedure after an award, the Appeals Board understands it is ratifying a longstanding practice that has existed and been followed by the Division and by practicing attorneys generally. The practice is consistent with the statutory scheme of the Workers Compensation Act and applicable policy considerations. The ALJ did not, therefore, exceed his jurisdiction in this case by conducting a preliminary hearing as a part of a post-award review and modification proceeding.

The Board recognizes that there is some confusion concerning what procedure is to be followed post-award in proceedings involving medical benefits. Typically, an award will provide for future medical benefits upon application to and approval by the director. Unfortunately, neither the Act nor the regulations set out what form that application should take. An attempt was made this past legislative session to implement such a procedure statutorily. That bill, however, was not enacted. Absent some statutory or regulatory change, or guidance from an appellate court, the Appeals Board will continue to follow its policy of treating post-award applications for medical treatment as preliminary hearings where the matter was heard pursuant to a form E-3 Application for Preliminary Hearing, it was treated as a preliminary hearing, and the preliminary hearing procedures were followed; and as a final order where the matter came before the ALJ on a motion, it was not treated as a preliminary hearing, and preliminary hearing procedures were not followed.

This matter came on for hearing before the ALJ in Docket No. 186,892 pursuant to claimant's filing of a form E-3 Application for Preliminary Hearing and an Application for Review and Modification for Post Award Medical and Attorney Fees.[1] (Claimant also filed an Application for Preliminary Hearing in Docket No. 233,958.) Although the Notice of Hearing served August 13, 1998, described the hearing as being on the Motion for Review and Modification, that the parties treated the hearing on the post-award medical treatment issue as a preliminary hearing is evidenced by the fact that there was also an Application for Preliminary Hearing that was preceded by the notice of intent letter mandated by the preliminary hearing statute, K.S.A. 1997 Supp. 44-534a. Also, the medical evidence was

[1] The ALJ's Order concerning claimant's request for attorney fees would be considered a final order and therefore subject to review by the Board, but the ALJ's findings concerning attorney's fees were not raised in this appeal.

introduced into the hearing record without foundation as is permitted for preliminary hearings by K.A.R. 51-3-5a. Moreover, at the outset of the October 8, 1998, proceedings, the ALJ announced:

> THE COURT: This is two docket numbers, the first docket number is 186,892, it is Deborah Zuercher versus Wheat State Manor. The second docket number is 233,958. The respondent is Newton Medical Center. This is a preliminary hearing on both of them slash review and modification on the Wheat State Manor, is that correct?
> MR. WILSON: Yes, your Honor.

There was no response to the Judge's question by other counsel. Their silence can be taken as acquiescence.

Because the hearing on claimant's application and motion concerning post-award medical treatment was conducted as a preliminary hearing, the Appeals Board's jurisdiction is limited. K.S.A. 1997 Supp. 44-551. The Appeals Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. This includes the specific jurisdictional issues identified in K.S.A. 1997 Supp. 44-534a. In this case the Appeals Board has jurisdiction of issue number 3 because the question of whether claimant's present need for medical treatment is the result of the March 14, 1993 work-related injury claimant suffered while employed with Wheat State, or whether it is instead the result of a subsequent injury is equivalent to one of the jurisdictional issues enumerated in K.S.A. 1997 Supp. 44-534a, specifically, whether the injury arose out of and in the course of the employee's employment.

Claimant injured her right knee on March 14, 1993 while working for Wheat State. That injury is the subject of Docket No. 186,892 which was settled by an agreed running award. In 1994 claimant went to work for Newton. On July 11, 1997, claimant reported knee pain to her supervisor at Newton and asked for medical treatment. Claimant attributed this increase in knee pain to her work with Newton, but the medical evidence suggests otherwise. Orthopedic surgeon Kenneth A. Jansson, M.D., treated claimant both before and after the July 11, 1997 incident. In his opinion, the chondromalacia he diagnosed on June 9, 1998 is a natural and probable consequence of the condition he diagnosed in June 1993, relative to her work at Wheat State.

Orthopedic surgeon Milton A. Claassen, M.D., who was authorized by Newton to treat claimant following her request for treatment in July 1997, concurred with Dr. Jansson's opinion that the chondromalacia is a natural and probable consequence of the progression of her earlier diagnosed chondromalacia. Both Dr. Claassen and Dr. Jansson suspected claimant's work activities at Newton contributed to claimant's current condition, but neither doctor would state that contribution opinion to a reasonable degree of medical probability.

Although claimant testified to experiencing periodic knee problems after leaving Wheat State in about March of 1994 and while employed with Newton, she sought authorized medical treatment through workers compensation insurance only once during this time before July 11, 1997. That was in July 1994. Thus, although claimant had some temporary flare-ups of symptoms that resolved, she went almost three years without feeling the need for authorized medical treatment for her knee before requesting same from her supervisor at Newton in July 1997. At that time, claimant thought her knee symptoms were caused by her job at Newton from pushing carts on carpeting and from "overworking it." Claimant's testimony is consistent with a specific work-related aggravation of her preexisting right knee condition. But the medical evidence in the record as it currently exists supports the conclusion that the present knee condition is a natural and probable consequence of the earlier injury.

The Kansas Supreme Court recently had an opportunity to visit this issue in the case of Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997). In that appeal from a review and modification proceeding, the Court reaffirmed the longstanding rule that "when a primary injury under the Kansas Workers Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury." Syl. ¶ 4. The Court went on to cite with approval the following comments of Professor Larson:

> Moreover, once the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause. This may sound self-evident, but in close cases it is sometimes easy to overlook this essentially simple principle." 1 Larson, § 13.11(a), pp. 3-609-16.

Although a new and distinct injury would distinguish this case from the natural and direct consequence rule, the rule does nonetheless apply to situations where a claimant's disability gradually increases from a primary accidental injury. The Court in Nance concluded "thus, where the deterioration would have occurred absent the primary injury, it is not compensable. However, when the passage of time causes deterioration of a compensable injury, the resulting disability is compensable as a direct and natural result of the primary injury." Id. at 550. From the medical opinions in the record, the Appeals Board concludes that claimant's present need for medical treatment stems from the natural progression of her compensable injury at Wheat State.

Wheat State also seeks review of the ALJ's decision to consolidate these claims for hearing. Although they involve separate employers, Wheat State's description of these two claims as "wholly unrelated" is hard to fathom. The issues in both cases involve the same facts and the same witnesses. Furthermore, a resolution of the issue concerning whether claimant suffered a subsequent intervening injury while employed with Newton is

not only an integral part of both claims but will be dispositive of one claim or the other depending upon how that issue is ultimately resolved. The ALJ did not exceed his jurisdiction in consolidating Docket No. 186,892 with Docket No. 223,958. Also, it has long been this Board's practice in cases where the appealed award/order bears more than one docket number and covers more than one docketed claim, to treat the appeal from any one of those docketed claims as an appeal from each and all of the docketed claims covered by that order. *See*, Carmen v. Best Buy, Docket Nos. 202,586, 204,207 and 210,069 (October 1997); McDiffett v. Food Services of America, Docket Nos. 177,095 and 177,096 (December 1996).

Next is the issue concerning the ALJ's ruling on the admission of medical evidence. The Appeals Board has previously held that evidentiary rulings are not appealable from a preliminary hearing order. *See*, Ogden v. Evcon Industries, Inc., Docket No. 230,945 (June 1998); Gonzales v. Allied, Inc., Docket No. 233,046 (June 1998).

Finally, the ALJ did not exceed his jurisdiction by ordering Wheat State and its insurance carrier to pay benefits furnished before claimant filed her application for review and modification. Future medical benefits were awarded by the terms of the original agreed award entered by Judge Clark on May 19, 1994.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge John D. Clark dated October 15, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 1999.

BOARD MEMBER

c: Steven R. Wilson, Wichita, KS
Jeffrey A. Chanay, Topeka, KS
Orvel B. Mason, Arkansas City, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director